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acceptances of guilty pleas. The effect of *McCarthy v. United States*[46] and *Boykin v. Alabama*,[47] moreover, is probably to deny habeas corpus relief to those petitioners asserting that they were coerced at the time of pleading.[48] This is so because compliance with Rule 11 insures that the voluntariness of the proceedings leading to a guilty plea is a matter of record.

McMann and its progeny go a step further by holding that allegedly coercive factors not in the record do not entitle petitioner to habeas corpus relief. In fact, the combination of *McCarthy-Boykin* with *McMann*, *Brady*, and *Parker* will make it difficult for most petitioners to obtain a hearing. That is, relief is foreclosed on the grounds that there was a coerced confession or the fear of a harsher sentence. No hearing thus need be granted to hear such claims. Furthermore, petitioners asserting the procedural incompetence of counsel or other coercive factors during the proceedings will face a complete record of the voluntariness of their plea.[49] It will therefore be easy for reviewing courts to dismiss such petitions without hearings.[50]

Hence, the administrative efficiency of the criminal justice system will be increased at the expense of defendants who may have been coerced into a plea of guilty. Notwithstanding that the Supreme Court once held that a conviction based on a coerced guilty plea is a violation of a defendant's right to due process,[51] *McMann*, *Brady* and *Parker* severely limit those factors deemed coercive. However, the constitutional rights waived in a guilty plea are too fundamental to be sacrificed involuntarily and unintelligently to administrative efficiency. If increased efficiency is the goal, the pre-pleading process could be improved to insure that all guilty pleas are voluntary and intelligent waivers of a defendant's fifth and sixth amendment rights as well as of his right to habeas corpus review. In no event should those defendants who may have been coerced into pleading guilty be denied their right to habeas corpus review because of the inadequate resources of the present system of criminal justice.

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[46] 394 U.S. 459 (1969).

[47] 395 U.S. 238 (1969).

[48] FED. R. CRIM. P. 11. Since the trial court, under Rule 11, cannot accept a guilty plea without first determining that it is voluntary, it is very unlikely that a petitioner could prevail on the assertion that he was coerced at the time of pleading.

[49] *See* notes 10 and 48 *supra*.

[50] 18 U.S.C. §2255 provides:

> Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no [habeas corpus] relief, the court shall . . . grant a hearing. . . .

Faced with a complete record of the voluntariness and the intelligence of the petitioner's plea, it will be very easy for the reviewing courts to dismiss petitions without granting a hearing.

[51] Herman v. Claudy, 350 U.S. 116 (1956).

JURY TRIAL

Williams v. Florida, 399 U.S. 78 (1970)

Under traditional rules, the game of draw poker is played with all cards initially concealed.[1] In stud poker all cards except one are shown to one's opponent. In *Williams v. Florida*[2] the Supreme Court opted for showing one's cards to one's opponents in the setting of the criminal adversary system. It also permitted the fate of the game to be constitutionally judged by a jury of six—rather than the traditional common law jury of twelve.[3]

Johnny Williams was tried and convicted by a six-man jury for the crime of robbery and sentenced to life imprisonment. Williams' only defense was alibi.[4] Under the Florida rules of criminal procedure,[5] the defendant is required, if the prosecution makes a written demand, to state whether he intends to plead an alibi. Should the defendant so plead, he must furnish the state with information as to his whereabouts at the time of the crime and a list of his alibi witnesses.

Prior to trial, Williams sought a protective order

[1] "If a criminal trial is viewed as a draw poker game with all cards to be held close to the chest until played, this [a notice-of-alibi statute] can be seen as requiring a tipping of one's hand in advance."
State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 136, 163 N.W.2d 177, 180 (1968).

[2] 399 U.S. 78 (1970).

[3] *See* Patton v. United States, 281 U.S. 276, 288–92 (1930).

[4] "Alibi is a claim that defendant was elsewhere at the time of the crime and therefore could not have committed it." State v. Baldwin, 47 N.J. 379, 388, 221 A.2d 199, 204, *cert. denied*, 385 U.S. 980 (1966).

[5] FLA. R. CRIM. P. 1.200.

excepting him from the notice-of-alibi rule on the grounds that it violated his fifth amendment privilege against self-incrimination.[6] The motion was denied.[7] In compliance with the notice-of-alibi rule, petitioner provided the prosecution with the name of his principle alibi witness, Mary Scotty. This information enabled the prosecution to obtain a pre-trial deposition of Mrs. Scotty, which was subsequently used to impeach the witness' trial testimony. Furthermore, the state's prior knowledge of the detailed time and location of Williams' alibi enabled the prosecution to further impeach Mrs. Scotty's testimony by presenting the contradictory testimony of a police officer who recalled seeing Mrs. Scotty at the time of the crime somewhere other than where she claimed she was.

Petitioner's constitutional attack on the alibi statute was two pronged. First he alleged that the statute sanctioning the right of the state to discover his alibi deprived him of due process under the fourteenth amendment.[8] Rejecting this claim, the Court emphasized the reciprocity in discovery which is permitted under the Florida rule. By the terms of the Florida statute, the state is required, upon receipt of defendant's list of alibi witnesses, to "serve upon the defendant the names and addresses ... of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause." [9] The Court apparently felt that a criminal discovery statute which imposed mutual obligations on the state and the accused did not violate the Constitution.[10] The Court also noted the rational and, indeed, compelling policy underpinning the notice-of-alibi statutes. As Mr. Justice White stated, speaking for the Court, "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." [11] Since 1927, numerous states[12] have enacted notice-of-alibi statutes[13] similar to Florida's as a means to deter defendants from using manufactured alibis as a last minute, surprise defense.[14] Such statutes have been uniformly upheld in state courts.[15]

Second, petitioner argued that the notice-of-alibi rule was unconstitutional because it violated his fifth amendment privilege against self-incrimination.[16] It is hardly questionable that the state's pretrial deposition of Mrs. Scotty, which was obtained because the defendant had complied with the Florida rule, quite possibly vitiated Williams' alibi defense and thereby indirectly incriminated him. The traditional rationale courts have employed to uphold the constitutionality of alibi statutes is couched in a literal interpretation of the fifth amendment privilege against compulsory self-incrimination, and rests on the notion that,

[6] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. V.

[7] Petitioner also unsuccessfully sought a pretrial motion to impanel a twelve-man jury instead of a six-man jury provided by Florida in all but capital cases. *See* FLA. STAT. ANN. §913.10(1) (1967).

[8] 399 U.S. at 81; U.S. CONST. amend. XIV(1) reads in part: "No state shall make or enforce any law which shall... deprive any person of life, liberty, or property without due process of law...."

[9] FLA. R. CRIM. P. 1.200.

[10] *See* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (Traynor, J.), which permitted the state discovery of defendant's witnesses and x-rays which were to support his defense of impotence to a charge of rape. Judge Traynor pointed out that criminal discovery should not be a "one-way street." *See also* Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 91 (1965); Comment, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135 (1963); *cf.* Norton, Discovery in the Criminal Process, 61 J. CRIM. L. C. & P.S. 11 (1970).

[11] 399 U.S. at 81; *See also* State v. Martin, 2 Ariz. App. 510, 514–15, 410 P.2d 132, 136–37 (1966); State v. Stump, 254 Iowa 1181, 1193–94, 119 N.W.2d 210, 217 (1963), *cert. denied*, 375 U.S. 853 (1963); State v. Baldwin, 47 N.J. 379, 388, 221 A.2d 199, 204 (1966), *cert. denied*, 385 U.S. 980 (1966); People v. Schade, 161 Misc. 212, 216, 292 N.Y.S. 612, 617 (1936); State v. Thayer, 124 Ohio St. 1, 4, 176 N.E. 656, 657 (1931).

[12] ARIZ. R. CRIM. P. 192(B); ILL. REV. STAT. ch. 38, §114-14 (1969); IND. ANN. STAT. §§9-1631–9-1633 (1956); IOWA CODE ANN. §777-18 (1962); KAN. GEN. STAT. ANN. §62-1341 (1964); MICH. STAT. ANN. ch. 28, §1043 (1956); MINN. STAT. ANN. §630.14 (1947); N.J. R. CRIM. P. 3: 5–9 (1958); N.Y. CODE CRIM. PROC. §295-L (McKinney 1958); OHIO REV. CODE ANN. §2945.58 (Page 1964); OKLA. STAT. ANN. ch. 22, §585 (1969); PA. R. CRIM. PRAC. 312 (Supp. 1970); S.D. COMP. LAWS §23-37-5 (1969); UTAH CODE ANN. §77-22-17 (1953), VT. STAT. ANN. tit. 13, §§6561–6562 (1959), WIS. STAT. ANN. §955.07 (West 1958). *See also* 399 U.S. at 82 n. 11.

[13] *See* Annot., 30 A.L.R.2d 480–81 (1953).

[14] One empirical study indicates such statutes to be most effective in preventing fraudulent alibies. *See* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29 (1964).

[15] Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963), State v. Rider, 194 Kan. 398, 399 P.2d 564 (1965); State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968); State v. Baldwin, 47 N.J. 379, 221 A.2d 199, *cert. denied*, 385 U.S. 980 (1966); People v. Schade, 161 Misc. 212, 292 N.Y.S. 612 (1936); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607 (1940); Commonwealth v. Vecchiolli, 208 Pa. Super. 483, 224 A.2d 96 (1966); State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968).

[16] In Malloy v. Hogan, 387 U.S. 1 (1964), the fifth amendment privilege against self-incrimination was held applicable to the state through the fourteenth amendment.

under the terms of the statute, no testimony is actually compelled.[17] Whether the defendant plans to defend on the basis of alibi is wholly a matter of the defendant's unfettered choice.[18] The defendant always retains the option of abandoning his alibi defense at trial.[19] The only real compulsion involved in complying with a notice-of-alibi rule relates to the time at which the defendant must reveal his defense. As the Court in *Williams* correctly pointed out:

> At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.[20]

Moreover, even if the defendant were not required to give pretrial notice of his alibi, there is nothing to prohibit the state from seeking a continuance for purposes of investigation should the defendant proffer a last minute alibi.[21] Therefore, the notice-of-alibi rule in no way bestows any advantage on the state which it does not already possess via other, albeit indirect, means.

Another literalistic argument in support of the alibi rule's constitutionality resides in the very basic question whether giving notice of alibi is in fact incriminating. In upholding a similar New York notice-of-alibi statute,[22] the court in *People v. Schade*[23] stated the obvious: notice-of-alibi statutes seek out information which exonerates defendants rather than incriminating them.[24] Concurring with *Schade*, Mr. Chief Justice Burger in *Williams* emphasized how pretrial discovery of alibi can work to the advantage of the accused.[25] He reasoned that if the state found the accused's alibi to be sound on the basis of pretrial investigation, a needless trial could be avoided.[26] In essence, the notice-of-alibi rule would only jeopardize a defendant whose alibi is manufactured.[27]

A more fundamental issue was at stake in *Williams*, however. Over and above the literal interpretation of the fifth amendment's application to the notice-of-alibi rule, the Court's decision reflected a judicial disposition between two competing policies: that of the government's discovery of fraudulent testimony versus that of the defendant's right under the fifth amendment to remain silent.[28] The Court uniquely illustrated the tension between these two policies by comparing the adversary system to a poker game.[29] In holding that the defendant may be compelled to reveal his alibi prior to trial, the Court found that the adversary system need not be like the game of draw poker in which all cards are concealed. The Court held that the exigent concern of the state for discovery of bogus alibis is paramount to any tactical trial advantage which the accused might gain from use of a surprise alibi defense.[30] States, therefore, may constitutionally require the defendant to "tip his hand."[31]

The *Williams* case, however, will probably be more remembered for its holding that a six man jury could constitutionally convict a man to life in prison than for its discussion of alibis. The

[17] *See* State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, *cert. denied*, 375 U.S. 853 (1963); State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607 (1940); State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968).

[18] 399 U.S. at 84–85.

[19] It has been held impermissible for the state to comment on the defendant's compliance with statute when at trial he elects not to use the defense. State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (1943). *But see* 399 U.S. at 110 (Black, J., dissenting).

[20] 399 U.S. at 85.

[21] *Id.*

[22] N.Y. CODE CRIM. PROC. §295-1 (McKinney 1958).

[23] 161 Misc. 212, 292 N.Y.S. 612 (1936).

[24] *Id.* at 615. *Cf.* State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968).

[25] 399 U.S. at 105–06.

[26] Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29, 32 (1964).

[27] "Certain it is that no innocent person can in any manner be injured by this statute." People v. Schade, 161 Misc. 212, 218, 292 N.Y.S. 612, 617 (1936). *See also* State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 137–38, 163 N.W.2d 177, 181 (1968).

[28] *See* Comment, 51 CALIF. L. REV. 131, 136–38 (1963). *Cf.* Shapiro v. United States, 335 U.S. 1 (1945).

[29] 399 U.S. at 82; *see* note 1 *supra* and accompanying text.

[30] State *ex rel.* Simos v. Burke, 41 Wis.2d 129, 163 N.W.2d 177 (1968); Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 91 (1953).

[31] *But see* 399 U.S. at 106 (Black, J. and Douglas, J., dissenting). Both Justices Black and Douglas vigorously dissented from the majority holding on the fifth amendment issue labeling it "a most dangerous departure from the Constitution and the traditional safeguards afforded persons accused of a crime." *Id.* at 116. Implicit in Black's dissent was his traditional disdain for the Court's balancing an accused's constitutional rights against the interest of the state. *See* Cohen v. Hurley, 366 U.S. 117, 133 (1961) (Black, J., dissenting).

petitioner argued that on the basis of *Duncan v. Louisiana*[32] a jury of less than twelve violated his sixth amendment guaranty to jury trial. Although the sixth amendment does not mention the number which shall comprise a jury, nevertheless Williams' challenge was not without substantial precedent.[33]

Seventy-two years ago the Supreme Court stated unequivocally, "[t]he supreme law of the land required that [defendant] should be tried by a jury composed of not less than twelve persons." [34] Although this excerpt from *Thompson v. Utah* is only dicta,[35] it does reflect the basic historical supposition of American jurisprudence that the constitutional jury embraces twelve men.[36] Two years later in *Maxwell v. Dow*[37] the high Court again reasserted the same principle "that a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment." [38]

In *Patton v. United States*[39] the issue before the Court was whether a defendant might constitutionally waive his right to a jury of twelve for a lesser number. Although the Court in that case held that, under the circumstances, waiver of a twelve-man jury was permissible, the Court insisted "that a constitutional jury means twelve men as though that number had been specifically named. . . ." [40] Relying on these cases, as well as the mandate in *Duncan v. Louisiana*[41]—that the fourteenth amendment grants to the defendant in state criminal action a trial by jury as though he were tried in a federal court—petitioner claimed his constitutional right to be heard by a jury of twelve under federal law.[42]

Breaking from adherence to the doctrine of *stare decisis*, the Court found that a trial by a six-man jury was not unconstitutional.[43] In doing so, the Court noted that juries of less than twelve are sanctioned by numerous state statutes[44] as well as by courts.[45] The obvious purposes underlying such statutes are judicial efficiency and economic expediency.[46] To justify its rift from long established precedent, the Court took refuge in the history surrounding the evolution of the jury trial.[47] Although the Court conceded that the early common law, as well as its own decisions, recognized a jury to be comprised of twelve,[48] it found no reason beyond "historical accident" [49] why the number twelve should be constitutionally sacrosanct.

The Court's apparent disregard for the venerable traditions embedding the twelve-man jury within our jurisprudence is disturbing. From a legal standpoint, the rule of *stare decisis* commits the law to consistency. In juxtaposing deviation from precedent to affirmation of it, the law can justify the former only by demonstrating a pressing social need for reform or an injustice resulting from the application of the old rule. It is debatable whether the common law jury of twelve can be condemned under either of the above characteristics. From a strictly empirical standpoint, one thing is certain about the twelve-man jury. It works. As Mr. Justice Harlan concluded in his dissent: "The decision in *Williams* . . . casts aside workability and relevance and substitutes uncertainty." [50]

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[32] 391 U.S. 145 (1968) (*Held:* the fourteenth amendment guarantees a right to trial by jury in all criminal cases which—were they to be tried in a federal court—would come within the sixth amendment guaranty.)

[33] *See* authorities cited at 47 AM. JUR.2d *Jury* §124, at 726 n. 5 (1969).

[34] Thompson v. Utah, 170 U.S. 343, 350 (1898).

[35] In *Thompson* the defendant had been convicted by a twelve-man jury for a crime committed in the Territory of Utah. After Utah was admitted to the Union, Thompson was granted a new trial. Pursuant to the new state constitution, defendant was tried by eight men. The Court held this change in number as an *ex post facto* law as applied to the defendant.

[36] *See* Capital Traction Company v. Hof, 174 U.S. 1, 13–14 (1899).

[37] 176 U.S. 581 (1900) *overruled in* Duncan v. Louisiana, 391 U.S. 145 (1968).

[38] *Id.* at 586.

[39] 281 U.S. 276 (1930).

[40] *Id.* at 292.

[41] 391 U.S. 145, 149 (1968).

[42] FED. R. CRIM. P. 23(b) provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

See 399 U.S. at 127 n. 13 (Harlan, J., dissenting); Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 430 (1969), wherein the commentator raises the issue raised in the instant case. Does the *Duncan* decision require the states to afford the accused a trial by a jury of twelve pursuant to federal law?

[43] 399 U.S. at 86. *But see also Id.* at 127–28 (Harlan, J., dissenting); *Id.* at 116–17 (Marshall, J., dissenting).

[44] For a compilation, see Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 430 n. 75 (1969).

[45] *E.g.*, State v. Perrilla, 144 Conn. 228, 129 A.2d 226 (1957); Hearns v. State, 223 So.2d 738 (Fla. 1969); State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968).

[46] State *ex rel.* Sauk County District Attorney v. Gollmar, 32 Wis.2d 406, 412–13, 145 N.W.2d 670, 673 (1966).

[47] *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8 (1961).

[48] 399 U.S. at 86–99.

[49] *Id.* at 89.

[50] 399 U.S. at 129.